IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 99 of 1994

The State of Maharashtra ... Appellant

V/s

Maruti Mahadeo Pawar ... Respondent

Shri V.B.Konde Deshmukh for Appellant

Smt.Ruchita Dhuru for Respondent

CORAM:S.S.PARKAR.

AND S.R.SATHE,JJ

DATED:21st Sept.2004

ORAL JUDGMENT :- (Per S.R.Sathe,J.)

1. The State of Maharashtra has preferred this appeal against the judgment and order passed by the 2nd Additional District Judge, Satara in Sessions Case No.230 of 1992 whereby the accused was acquitted for the offence punishable under Section 302 and 201 of I.P.C.

2. Brief facts giving rise to this appeal are as under :-

. The present accused is the elder brother of

deceased Shivaji. These two brothers were having joint family property consisting of agricultural land as well as some moveable property. As there was dispute between these two brothers regarding joint family property, with the intervention of the villagers partition had taken place about 2 1/2 years back prior to the incident. At that time one Maruti Kamble had mortgaged his land with the accused against an amount of Rs.10,000/-. As it was the mortgaged property, partition had not taken place in respect of the said land. Admittedly said Maruti Kamble subsequently repaid the amount of Rs.10,000/- to present accused and got the land redeemed. Naturally out of the said amount of Rs.10,000/-, Rs.5,000/- were to be paid by the accused to the deceased. However, the accused avoided to make the said payment and on that ground there was some dispute between the accused and deceased.

3. On 6-8-1992 or thereabout when deceased had demanded the said amount of Rs.5,000/- from the accused he had given threat to him and rushed towards the deceased. It is the prosecution case that on 9-8-1992 in the morning the deceased and his wife Shobha had been to their field. In the afternoon at about 12 noon or 12-30 p.m. Shobha returned home. At about 4-00 p.m. Shobha’s son Vikram, aged about 6 years, was playing out of

the house of deceased. At about 4-30 p.m. he went running to his mother and told her that he saw the accused, assaulting deceased with an axe. The wife of deceased Shobha thereafter immediately went out of the house and she reached to the place of incident. She found that deceased and deceased was lying on the ground and accused was assaulting him with an axe. When she asked accused as to why he was assaulting the accused, he told that deceased wanted partition and on saying so he went running from the said place. When the wife of deceased Shobha was sitting near the dead body of her husband somebody informed the Police about the incident. At about 7-30 p.m. or so the P.S.I. Shaikh reached at the place of offence. When he made enquiry with the wife of deceased, she narrated the entire incident to him. Thereafter P.S.I. Shaikh Exh.37 recorded the complaint of the complainant Shobha and then registered the offence punishable under Section 302 of IPC. He then drew inquest panchanama Exh.10 as well as panchanama of the place of offence. He sent the dead body for post mortem. He recorded the statements of witnesses and also searched for the accused. However, the accused was not found on that day. On 12-8-1992 P.S.I.Shaikh received information in the police Station that the accused is in the house of one Narayan Pol. He

therefore went to the said place and took the accused to the Police Station and arrested him on 12-8-1992. He also attached the clothes on the person of the accused. When accused was in Police custody on 13-8-1992, he made statement before the Police that he would point out the weapon and accordingly Police drew the memorandum and then the accused took panch and Police to village Gondhi at his land and produced one axe hidden from that chappar. They were blood stains on the axe. Police then sent the attached property including the clothes of accused and deceased as well as the blood sample of deceased and accused to C.A.. After obtaining C.A. report and completing the investigation, Police submitted the charge sheet in the court of J.M.F.C., Karad. Finding that the accused is charge sheeted for the offence punishable under Section 302 of IPC which is exclusively triable by the Sessions Judge, the learned J.M.F.C., committed the case to the Sessions Court at Satara.

4. The learned 2nd Additional District Judge, Satara framed charge Exh 3 against the accused for the offences mentioned above. The charge was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried. From the suggestions put to the PWs and statement of

accused recorded under Section 313 of Criminal Procedure Code, it appears that the defence of the accused is of total denial.

5. In order to bring home the guilt of the accused, the prosecution has examined as many as 10 witnesses consisting of panch witness Shri Ramesh V. Mane Exh.20, another panch witness Shri Shivram B. Mane Exh.25, witness Shri Dnyandeo K. Thorat- maternal uncle of accused and deceased- Exh.26, Shri Narayan D. Pol, Exh.27, widow of deceased -Smt.Shobha S. Pawar, Exh.28, Shri Mahadeo B. Karande, Exh.31 and daughter Ku.Shaila S. Pawar - Exh.32, Witness Ismail Chand Mulla, Exh.33, Hanmant B. Pawar, Exh.34 and Investigating Officer Abdul K. Huseen Shaikh Exh.37. The prosecution also produced the panchanama of the place of incident Exh.10, Inquest panchanama Exh.36, Post mortem report Exh.21 etc. As against this defence did not produce any evidence.

6. After considering the evidence adduced by the prosecution, the learned Sessions Judge came to the conclusion that the prosecution has failed to prove beyond reasonable doubt that the accused has committed the alleged offence. He therefore acquitted the accused.

7. Being aggrieved by the same, the State of Maharashtra has filed this appeal.

8. In this appeal before us the learned A.P.P. has urged two points. Firstly, he submitted that the learned trial Judge has not at all properly appreciated the evidence on record and has wrongly held that there was no eye witness to the incident. Secondly, he canvassed before us that the learned trial Judge has given undue importance to the fact that the prosecution did not examine child witness Vikram and other persons residing nearby the place of incident. He therefore submitted that the order passed by the learned trial Judge is not legal and correct and it has to be set aside.

9. As against this the learned Advocate for the accused supported the judgment and order passed by the trial Judge.

10. The relations between the accused and deceased is not in dispute. It is also admitted that partition had taken place in respect of the joint family property and accordingly document Exh.14 was prepared. It is also admitted that one Maruti Kamble had mortgaged his land with the accused for Rs.10,000/- and subsequently he had repaid the said amount and redeemed the mortgage.

Admittedly accused was to pay an amount of Rs.5,000/- out of the said mortgaged money to the deceased and deceased was insisting for the said amount. The prosecutions witness Shobha Exh.28 has stated that her husband died on 9-8-1992 as a result of the assault made by accused. Admittedly when PSI Shaikh reached to the place of offence he noticed the dead body at the said spot and accordingly he drew inquest panchanama and then dead body was sent for post mortem. The post mortem report was produced by the prosecution at Exh.12. The same was not at all disputed by the defence. From perusal of the said post mortem notes and even from suggestions put to PW 1 it is clear that the death of Shivaji was homicidal. The injuries sustained by the deceased which are mentioned in column nos. 17 and 18 of post mortem notes. The same are as follows:

i. Incised wound on the left side of forehead; oblievue 2"x2" bone deep bone out (frouta)

ii. Incised wound on left side of neck, just below the ear - 4" x1/2" x 1/2" reddish trip of left earlobe is cut’

iii Three incised wounds all obiouve on ocuprital marion on of scalp 2 1/2"x 1/2" x bone deep

iv. Transfers incised wound on might popliteal fossa 7"x5" x bone deep. Right femur bone is cut transve sely.

v. Two transverse incised wounds on post surface of left leg. 5"x3" bone deep each. Blood lot present left tribia fribula cut transversely.

vi. Transverse incised wounds on left popliteal fosa 4"x3"x bone deep blood lot+

vii Cut fracture of frontal occuprital bone might femur, left femur left Yribria Cibula.

And cause of death is shown as " Syncope due to multiple injuries on body, cutting fracture of multiple bones,cutting of brains substance."

11. The main and material question is whether the said death was caused at the hands of accused. In order to prove the same, the prosecution has brought on record direct evidence as well as circumstantial evidence. Direct evidence consists of witnesses Shobha, Exh.28. She has stated that on that day at about 4-20 p.m. her son Vikram aged about 6 years, came to her and told her that his father was being assaulted by accused with an axe. Shobha

immediately went out of the house and she noticed that accused was assaulting the deceased with an axe. She reached at the place of incident within 2 minutes and at that time the accused gave blow to the deceased and ran away from the said place by saying that deceased wanted to have partition. Now this evidence of witness Shobha is not accepted by the learned trial Judge. According to him, there was considerable time gap between Vikram seeing accused assaulting deceased and finally Shobha reaching place of offence. So her testimony was not accepted. However, we feel that the trial Judge has not at all minutely scrutinised the evidence on record and as a result of the same he has reached to a wrong conclusion. If he had scrutinised the entire evidence minutely and had made an effort to sift the truth from the falsehood he would have surely noticed that what Shobha had told whatever she had actually seen. It has come in evidence of Shobha that her son Vikram told her that deceased was being assaulted by the accused and immediately, thereafter she went out of the house and after crossing 5 steps she could see the place of incident. That obviously means that even Vikram had also seen the accused assaulting deceased, not by going very near to the place of offence but merely from the place where he was watching fishing or was playing near the house.

It is nowhere even suggested to Shobha that place of incident was not visible near from her house. It is also not suggested to her that it was not possible for her to reach the place of offence within 2 minuets. So, when this evidence has gone totally unchallenged there was no reason for the learned trial Judge to hold that there was no sufficient opportunity for the complainant Shobha to see the alleged incident. It must be noted that evidence of Shobha is not at all shaken or shattered in the cross examination. An attempt has been made to show that Shobha has made an improvement and there are some omissions and contradictions. However, these omissions and improvements are very minor and they do not at all go to the root of the case. So these omissions or minor improvement are certainly not sufficient to discard her testimony. On the contrary it must be noted that FIR has been lodged immediately after the time PSI Shaikh reached at the place of offence. We find that incident has taken place at about 4-30 p.m. while FIR is registered at about 8-00 p.m. on the same day. So there is prompt lodging of FIR. In this FIR the complainant has specifically named the accused and also given the overacts of the accused. So, it cannot be said that within such short time the complainant would hatch a plan to involve the accused in the said crime.

There is nothing to show that it was concocted story. Under such circumstances the evidence of complainant Shobha appeared to us trustworthy.

12. It is pertinent to note that admittedly in this case there was a motive. It has come on record that even 2 days prior to the incident there was some dispute between accused and deceased and at that time also the accused had rushed towards the deceased and given threat to him. Witness Shaila Exh.33 has also stated that just few minuets prior to the incident she had seen accused proceedings towards his house and at that time he had made query with her about whereabouts of her father and she had told him that accused had gone to stream. She has further stated that immediately thereafter she saw accused proceedings towards the directions in which the deceased had already gone and the accused was having an axe in his hand at that time. The learned trial Judge has observed that if really Shaila had seen her uncle proceedings towards that direction with an axe, she would have informed to her mother at that time only. However, we cannot ignore the fact that incident has taken place in a village. Admittedly the accused as well as deceased are farmers. So, merely because Shaila had seen the accused going towards the direction of Stream with an axe, it

cannot be said that it would occur to her that the accused is proceedings in that direction with a view to assault her father. The observations made by the learned trial Judge in that behalf are not at all borne out from the evidence on record.

13. Much is made about the fact that prosecution has not examined child witness Vikram. Firstly it must be noted that admittedly at the time of incident Vikram was only 6 years of age. It seems that prosecution has made a submission to the Court that he being child witness was not in a position to give evidence and as such prosecution did not examine him. Of course, if the prosecution had made an attempt to examine Vikram certainly that would have been better. However, at the same time it must be noted that as there is sufficient other evidence including eye witness Shobha on record, non examination of child witness Vikram cannot be said to be fatal to the prosecution case. It was argued on behalf of the accused that in the instant case it has come on record that there are other houses near from the place of incident, and the prosecution could have examined the occupants of those houses or even the passer by. It is true that place of incident is adjacent to the public road but that does not mean that at the relevant time there

were other persons witnessing the incident and they were available to the Police. Merely because there are some houses near the place of incident,one cannot jump to the conclusion that the incident was actually seen by the occupants of those houses. We also cannot ignore the fact that usually people are reluctant to come forward and tell about the incident to Police. So, non examination of any of those residents would not make any difference so far as prosecution case is concerned.

14. The PSI Shaikh Exh.37 has stated that on the day of incident after recording of complaint he searched for the accused but accused was not found. It has also come on record from the evidence of witnesses Narayan D. Pol and Hamant B. Pawar Exhs. 27 and 34 respectively that on 12-8-1992 the Police received information on telephone that accused is in the house of Pol and as a result of the same investigating squad immediately went there and the accused was found sleeping in the house. PSI has stated that he brought the accused to the police Station and arrested him. It is unfortunate that Police have not made arrest panchanama and to that extent there is lacuna or infirmity in the prosecution case. However, in the light of other evidence this infirmity is not so grave and sufficient to

throw the prosecution case over board. There is no reason to disbelieve the evidence of the witness Hanmant B. Pawar, Narayan Pol and PSI A. K. H. Shaikh in this behalf. So from the evidence of these 3 witnesses it is very clear that accused was absconding from the place of incident and thereafter he was found on 12-8-1992 at the house of one Pol. there is another piece of evidence which also lends some support to the prosecution case. Witness Ismail Chand Mulla Exh.33 has stated that after the incident on that day at night when he was standing by the side of the liquor shop he found that accused had gone there with gun in his hand and he was wandering here and there and as such witness Ismail M. Mulla asked him as to why he was wandering here and there and at that time accused told him that he has committed murder of his brother and if anybody would intervene he will shoot him and on so saying he fired one shot in air and went away. There is absolutely no reason why one should disbelieve the witness Ismail Mulla. It is suggested to him that as he is related with PSI Shaikh he has deposed falsely. We are not inclined to accept the suggestion in that behalf and hold that on such ground Ismail Mulla will try to implead the accused falsely.Due wieghtage has to be given to the evidence of witness Mulla.

15. There is another clinching evidence which also support the prosecution story. Witness Ramesh V. Mane Exh.20 - has stated that when accused was in police custody he made statement before the Police and said that he will show the axe kept by him at his cattle shed and police drew the memorandum and then accused took them to his field. The accused entered in the shed and took out one axe concealed in the fodder. The said axe was seized under panchanama. The evidence of witness Ramesh Mane is not at all shaken or shattered in the cross examination. It is also corroborated by the evidence of PSI Shaikh. So the discovery of weapon in this case is duly proved. Further it has come on record that when this axe was sent to C.A. C.A. it was found contending blood stains. The blood found on the same was of AB group which was admittedly blood group of the deceased. It is pertinent to note that no explanation is given by the accused about finding of this blood stain on the axe. So, this is a very important circumstance which also shows finger towards the present accused. Similarly the clothes of accused which are seized by panchanama Exh.36 were sent to C.A. and C.A. found blood stains on the said clothes. The blood was of AB group, which was the blood group of deceased. So finding of the blood stains on the axe as well as on the clothes of the accused

is another piece of evidence which connects the accused with the alleged crime.

16. So far as offence punishable under Section 201 of IPC is concerned there is no sufficient evidence to show that the accused is guilty under Section 201 of IPC. The trial Court rightly acquitted the accused of the offence punishable under Section 201 of IPC.

17.In view of above, it is very clear that there was cogent and convincing evidence to connect the accused with the alleged murder. However, the learned trial Judge did not examine the entire evidence in proper perspective and observed that the accused is entitled to get benefit of doubt. In fact it must be noted that evidence on record was not such which would create any reasonable doubt.

18. We therefore, feel that finding recorded by the learned trial Court is not legal and correct and as such it is necessary to interfere with the same and allow the appeal.

19. At this stage the learned Advocate for the accused submitted that at present the accused is about 67 years of age and as such lenient view be taken.

. Taking into consideration all the facts and circumstances we feel that punishment of imprisonment for life would meet the ends of justice.

. In view of the above, the appeal is partly allowed and the order passed by 2nd Additional Sessions Judge, Satara in Sessions Case NO.230 of 1992 acquitting the accused for the offence punishable under Section 302 of IPC is set aside. The accused is convicted for the offence punishable under Section 302 of IPC and is sentenced to suffer imprisonment for life and to pay fine of Rs.500/- in default to suffer r/i for one month.

. The order of the trial Court acquitting the accused for offence punishable under Section 201 of IPC is confirmed.

. The accused is entitled to get set off for the period of detention undergone by him as per Section 428 of Cr.P.C.

. The accused to surrender his bail forthwith.

. The compliance of the above mentioned order be reported by 21st October 2004.

(S.S.PARKAR, J.)

(S.R.SATHE, J).